

**BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA**

In the Matter of:

Nicole R.

Claimant,

vs.

HARBOR REGIONAL CENTER,

Service Agency.

OAH No. L 2006080768

DECISION

This matter came on regularly before, Sandra L. Hitt, Administrative Law Judge (ALJ), Office of Administrative Hearings, on March 6, 2007, in Torrance, California. Claimant, Nicole R. (Claimant), was represented by her father, who is Claimant's authorized representative.¹ Steve Roberts, Manager of Rights Assurance for the Harbor Regional Center (HRC), represented the Service Agency.

Service Agency submitted Exhibits A-J. Claimant submitted Exhibits 1 and 2. These documents were admitted into evidence, with Exhibit 2 being admitted as administrative hearsay. The evidence was received, the matter was argued, the record was closed, and the case was submitted for decision on the hearing date.

ISSUE

Should Service Agency be required to pay for one hour per week of occupational therapy (OT) for Claimant pending the result of a due process hearing to adjudicate this issue between Claimant and the Los Angeles Unified School District (LAUSD)?

¹ Claimant's surname, and that of her family members, is omitted throughout this Decision to protect their privacy.

FACTUAL FINDINGS

1. On August 13, 2006, Claimant's father filed a Fair Hearing Request (FHR) on her behalf. In that FHR, Claimant's father asked that the Service Agency fund occupational therapy (OT) services for his daughter. This hearing ensued. At the hearing, the Service Agency took the position that it should not be required to fund OT services for Claimant at this time because Claimant must first exhaust her remedy with the "generic resource" (in this case, the school district) before seeking funding from HRC, and Claimant has not yet filed a request for a due process hearing with LAUSD. Service Agency did not dispute that Claimant needed additional OT, and Claimant's father did not dispute that LAUSD should pay for the additional OT. However, Claimant's father requested Service Agency to pay for the additional OT pending the results of a due process hearing.

2. Claimant is five years and one month old (D.O.B.: 1/28/02). She has a diagnosis of autism and is a client of HRC. Claimant has serious motor skills issues. She has low muscle tone, frequently falls when running, does not hold a pencil properly, and refuses to feed herself with a spoon. Claimant's motor skills issues previously resulted in a serious accident that required surgery. Claimant also has sensory processing issues. She is hyper-sensitive to tactile experiences, and refuses to touch wet, sticky or slimy textures, although she has improved her willingness to use soap during hand washing. She becomes upset if the water temperature changes while she is washing her hands. She is afraid of falling when on a swing or anything that is moving. She has difficulty with social interactions (Exhibits B and E). Claimant is enrolled at Crestwood Street Elementary School, in the LAUSD (Exhibit E). Claimant is receiving 30 minutes per week of OT, 20 minutes per week of adaptive physical therapy (APE), and one hour of speech therapy, through LAUSD. Claimant receives applied behavioral analysis (ABA) services and social skills training through Service Agency (Exhibit E).

3. Claimant has been receiving 30 minutes of OT per week through LAUSD since 2004. Around the beginning of 2006, Claimant's parents decided that 30 minutes of OT per week was insufficient to meet her needs. They expressed this concern to Claimant's teacher and her OT specialist at school. Claimant was then assigned 20 minutes per week of APE. Claimant's parents were hoping that she would respond to the new therapy because she was making progress in her speech and language skills and they anticipated that this progress might be generalized to other areas. However, by August 2006, it was clear to them that Claimant was not meeting her objectives, and they requested more OT through LAUSD. LAUSD refused the request. The Crestwood elementary school does not have the equipment/facilities to address certain of Claimant's needs.

4. In the past, LAUSD has declined to provide services for Claimant through a non-public agency (NPA), saying there is no clinical basis for doing so, and that they are responsible only for meeting Claimant's educational needs. (For example, Claimant's parents are concerned that she has difficulty going up and down

stairs, and is afraid of swings. The School's response was "we don't have stairs or swings here, so it is not our responsibility to address those issues.")

5. Claimant's last Individual Program Plan (IPP) meeting with Service Agency was held approximately one year ago (Exhibit E). Objectives set at that meeting included Claimant's learning to dress herself, using a spoon to feed herself, and initiating social interaction with familiar people. Claimant did not meet all of her goals, but she did make significant progress (Exhibits E and J).

6. Service Agency's position is that it is the payer of last resort. In taking this position, Service Agency relies on the prohibition against supplanting generic resources in California Welfare and Institutions Code section 4648.² Service Agency contends that Claimant's FHR is premature, as her next Individual Education Plan (IEP) meeting with LAUSD is scheduled for April 13, 2007. Service agency provided some assistance to Claimant in preparing for her IEP. Service agency made available to Claimant the services of Benjamin Kim, Service Agency's special education attorney (Exhibit B). Claimant's father met with Mr. Kim. Additionally, Claimant's parents met with Service Agency's OT specialist, Pam Hellman. Claimant's parents found this meeting to be disappointing. They had expected that Ms. Hellman would perform a mini-assessment of Claimant, but Ms. Hellman spent only four or five minutes with Claimant, and did not appear to be interested in advocating for more OT for Claimant. Claimant's parents have invited Claimant's Service Agency counselor to attend the next IEP meeting; they have not requested anyone else from the Service Agency to attend the IEP meeting with them.

7. Claimant's parents have not yet filed a request for a due process hearing; they have been waiting for the results of a private evaluation they had performed by Pediatric Therapy Network (PTN).³ The evaluation was performed in January 2006 (Exhibit 1). Claimant's parents chose PTN because Claimant had previously attended PTN's Leaps and Bounds program through the Service Agency, and the PTN staff were familiar with Claimant. Claimant's parents did not have the evaluation performed earlier because (1) they had to save the money to pay for a private evaluation and (2) they wanted to "benchmark" Claimant at the age of five years. Claimant's parents were aware that they could request an evaluation from LAUSD, but felt that a private evaluation would be more objective. The PTN evaluation was completed by Elaine Chou, MA, OTR/L, Supervisory Occupational Therapist at PTN and it was approved by Zoe Mailloux, MA, OTR, FAOTA, Director of Administration for PTN.

8. The evaluation revealed that Claimant has deficiencies in the sensory systems that process touch, movement, balance and body position, indicating challenges for Claimant in participating in sports and other play, self-care routines, writing, drawing, and social interaction. PTN recommended that Claimant receive additional OT in a

² All citations are to the Welfare and Institutions Code unless otherwise noted.

³ PTN is a Service Agency Vendor. However, Claimant's parents arranged for the evaluation and paid for it from private funds.

“setting with a variety of swings, climbing structures and tactile materials where she would have opportunities to explore different sensory experiences in a fun and functional way and . . . challenge and develop her postural control and play skills.” PTN also suggested that engaging in activities such as swimming, gymnastics, judo/karate, bike riding and ice or roller skating hockey two or three times a week may be helpful, as well as music and art classes, and various fun activities such as cooking and craft-making.

LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Act (Lanterman Act) governs this case. (Welfare and Institutions Code §§ 4500 et seq.) Claimant properly and timely presented a fair hearing request and otherwise established jurisdiction for this case (Factual Finding 1).

2. The Individuals with Disabilities in Education Act (20 U.S.C. § 1400 et seq.) (IDEA) is a federal law that provides funding for education programs for disabled students in states that choose to participate in that federal program. California has chosen to participate. (Ed. Code §§ 56340 – 56449.)

3. Persons afflicted with autism are entitled to services under the Lanterman Act, section 4512, subdivision (a), and under IDEA. (20 U.S.C. § 602(3)(b)(i)). Claimant has autism (Factual Finding 2).

4. IDEA and its special education programs are administered in California by the state's local educational agencies. In this case, that agency is LAUSD. Services and supports for autistic children available under the Lanterman Act are administered by California's Regional Centers, also known as service agencies. In this case, Harbor Regional Center is the service agency (Factual Finding 2).

5. Claimant and LAUSD are presently engaged in a dispute over the level of services offered by LAUSD (Factual Findings 3, 4 and 7). This decision does not decide the dispute between LAUSD and Claimant. Those issues need to be resolved by a due process hearing.

6. In general, providing services of education and training for autistic persons over the age of three years is the primary responsibility of the school district, with Service Agency having ultimate responsibility for any unmet needs (§ 4648, subd. (f); and compare IDEA, § 602, subd. (8) and (22), with §§ 4512, subd. (b), 4648 subd. (a)(8), and 4648 subd. (f)).

7. The Lanterman Act requires regional centers to provide developmentally disabled people with those services and supports that will allow them, “regardless of age or degree of disability, and at each stage of life” to integrate “into the mainstream life of the community” and to “approximate the pattern of everyday living available to people without disabilities of the same age.” (§ 4501.) The Act also states that persons with

developmental disabilities have the right to treatment and habilitation services and supports which foster the individual's developmental potential and are "directed toward the achievement of the most independent, productive and normal lives possible." (§ 4502.) The Act also contemplates that the regional centers will work with consumers and their families to secure "those services and supports which maximize opportunities and choices for living, working, learning and recreating in the community."

8. The Service Agency is required to secure services and supports that meet the individual needs of the consumer (§ 4501.) The needs of the consumer are determined through the IPP process, and the services provided should "be effective in meeting the goals stated in the individual program plan, reflect the preferences and choices of the consumer, and reflect the cost-effective use of public resources." (§ 4646, subd. (a).)

9. Section 4512, subdivision (b), states in pertinent part:

Services and supports for persons with developmental disabilities means specialized services and supports or special adaptations of generic services and support directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives. . . . Services and supports listed in the individual program plan may include, but are not limited to, . . . recreation,

10. The Service Agency's denial of the request for funding for additional OT is predicated on its contentions that the local school district, as a "generic" resource, should be pursued before the Service Agency is asked to provide such services. HRC contends that it is prohibited from granting Claimant's request by section 4648, subdivision (a)(8), which prohibits regional centers from using their funds to supplant those of a "generic" agency such as the school district (Factual Finding 6).

11. At present, Claimant has an unmet need (Factual Findings 3, 5 and 8). Claimant was assessed as needing OT (Factual Findings 2 and 8). Claimant is presently receiving only 30 minutes of OT per week from LAUSD. Claimant's parents believe LAUSD is incorrect in its decision not to fund additional OT for Claimant (Factual Finding 3). Claimant's motor skills issues have already resulted in one serious accident requiring surgery (Factual Finding 2). Claimant has not met objectives set for her in her IPP meeting a year ago (Factual Finding 5). The evidence at hearing established that Claimant is not merely attempting to avoid utilizing LAUSD so as to make HRC fund Claimant's needs (Factual Findings 3, 5 and 7). LAUSD is not providing the requested additional weekly hour of OT to Claimant (Factual Finding 3). That being the case, the Service Agency is not precluded by section 4648, subdivision (a)(8), from funding this service, if needed, because there is no evidence that such expenditure will "supplant" the special education budget of the school district. When a generic agency fails or refuses to provide a regional center consumer with those supports and services which are needed to allow that person to maximize their potential for a normal life, the Lanterman Act

requires the regional centers to provide the service shortfall. Funding for Claimant's unmet need is the responsibility of the HRC (see §§ 4500, 4501 and 4648, subd. (f)).

12. If HRC feels that the school district has failed to provide services to Claimant that IDEA requires it to provide, it has the authority to pursue reimbursement under section 4659, subdivision (a), which provides that "the regional center shall identify and pursue all possible sources of funding for consumers receiving regional center services. These sources shall include, but not be limited to, . . . (1) Governmental or other entities or programs required to provide or pay the cost of providing services."

13. It was established that Claimant can benefit from one hour per week of additional OT (Factual Finding 8). It is not always possible to separate those services which address "educational" or "cognitive" needs (and therefore are primarily the responsibility of the school district) from those services that address "adaptive" or "behavioral" needs (and are therefore primarily the responsibility of the Service Agency). The OT program recommended by PTN addresses both educational and adaptive/behavioral needs (Factual finding 8). A due process hearing may well establish that it is LAUSD's responsibility to pay for Claimant's additional OT. However, since LAUSD now denies responsibility for providing this service (Factual Finding 3), HRC is required to provide Claimant with sufficient support and look to LAUSD for any reimbursement.

WHEREFORE, THE FOLLOWING ORDER is hereby made:

ORDER

Claimant's request for funding by the Service Agency for one hour per week of additional OT is granted, conditioned upon Claimant's filing a due process request with LAUSD to provide these services. HRC shall begin the process of providing for such services upon Claimant's presenting proof to HRC that Claimant has filed such due process hearing request.

DATED: March 16, 2007

SANDRA L. HITT
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.